
NOTE

Surrogacy in California: Replacing Section 7962 of the California Family Code with a Two-Part Hybrid Best Interests Test

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INTRODUCTION

Surrogacy arrangements are becoming increasingly popular in the United States with a growing demand from infertile couples, single parents, and homosexuals.¹ An estimated 35,000 babies have been born to surrogates since the 1980s with an estimated 2,000 born in 2014 alone.² Surrogacy allows couples who are physically unable to conceive as well as those without viable partners to have their own genetic children. There are two methods of surrogacies: traditional and gestational.³ In a traditional surrogacy, the surrogate's own egg is artificially inseminated with either the intended father's sperm or donor sperm.⁴ In a gestational surrogacy, there is no biological relationship between the surrogate and the child. The surrogate is implanted with the intended father's or donor's sperm and the intended mother's eggs or a donor's eggs.⁵ This can lead to confusing arrangements where up to five people have parental claims to children.⁶

¹ See, e.g., J. Herbie Difonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 350-51 (2011) (discussing the "unquenchable" thirst for offspring that began in the United States during the 1950s that led to the ideal of the nuclear family as "domestic perfection"); Joan Cary, *Surrogate Births Growing in Popularity*, CHI. TRIB. (Oct. 9, 2013), <http://www.chicagotribune.com/lifestyles/health/ct-x-1009-surrogate-20131009-story.html> ("More people with fertility problems are choosing gestational surrogacy over adoption."); Deborah L. Cohen, *Surrogate Pregnancies on Rise Despite Cost Hurdles*, REUTERS (Mar. 18, 2013, 2:41 PM), <http://www.reuters.com/article/us-parent-surrogate-idUSBRE92H11Q20130318> (telling the story of an intended mother who sought to conceive through a surrogate despite projected costs of \$300,000, which forced her to sell her possessions and move back in with her parents).

² Tamar Lewin, *Coming to U.S. for Baby, and Womb to Carry It*, N.Y. TIMES (July 5, 2014), <http://www.nytimes.com/2014/07/06/us/foreign-couples-heading-to-america-for-surrogate-pregnancies.html>; *Exciting Statistics on Surrogacy*, BUILDING FAMILIES, INC. (May 14, 2012), <http://www.buildingfamiliesinc.com/en/2012/05/exciting-statistics-on-surrogacy>.

³ Amanda M. Herman, *The Regulation of Gestation: A Call for More Complete State Statutory Regulation of Gestational Surrogacy Contracts*, 18 CHAP. L. REV. 553, 556 (2015).

⁴ Using the intended father's sperm allows him to have a genetic connection to the child. See Leora I. Gabry, Note, *Procreating Without Pregnancy: Surrogacy and the Need for a Comprehensive Regulatory Scheme*, 45 COLUM. J.L. & SOC. PROBS. 415, 418-19 (2012) (explaining that paternity in surrogacy can be achieved in two fashions, either through a donor (genetically unrelated) or the intended father (genetically related)).

⁵ Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 98-99 (2010).

⁶ The surrogate, the genetic parents, and the intended parents potentially have parental rights claims for a child born from surrogacy. See Craig Dashiell, Note, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding*

To prevent custody issues in surrogacy arrangements the intended parent(s) will usually contract with the surrogate.⁷ Oftentimes, an agency specializing in surrogacy arrangements will be hired, as will an attorney who specializes in the field.⁸ The cost of this process often exceeds \$100,000.⁹

Adoption is the other option for those who cannot conceive naturally.¹⁰ However, it can be costly, risky, and potentially disrupted by the birth parent.¹¹ Additionally, adoption does not provide the biological connection between parent and child that is paramount for many parents.¹² For these reasons, it is unsurprising that increasing numbers of parents are exploring surrogacy as a viable alternative.¹³

Despite the increasing popularity of surrogacy arrangements, there are no federal laws regulating surrogacies.¹⁴ As a result, many states apply widely divergent standards to adjudicate custody disputes arising from surrogacy arrangements. Some states, such as California, use an intent test to determine custody.¹⁵ Other states determine parental rights by using a genetic or gestation test.¹⁶ Further, some

Surrogacy, 65 RUTGERS L. REV. 851, 855 (2013) (showing that up to three women and two men can simultaneously claim parental rights).

⁷ See Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459, 472-73 (2015) (discussing the considerations that go into a surrogacy contract).

⁸ *Id.* at 476-77 (discussing use of an agency); *id.* at 483 (discussing use of an attorney).

⁹ See *Costs: Essential & Fixed Fee*, CIRCLE SURROGACY & EGG DONATION, <http://www.circlesurrogacy.com/costs/essential-and-fixed-fee> (last visited Feb. 9, 2018) (PDF available at the bottom of the page); see also Morrissey, *supra* note 7, at 483 (estimating cost of average surrogacy arrangement).

¹⁰ See Gabry, *supra* note 4, at 415 (stating that today, natural conception, adoption, and surrogacy are three main ways to become a parent).

¹¹ Difonzo & Stern, *supra* note 1; see U.S. DEP'T OF HEALTH & HUM. SERVICES, PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES 1, 3 (2016), https://www.childwelfare.gov/pubs/s_cost/s_costs.pdf.

¹² See Erin Y. Hisano, *Gestational Surrogacy Maternity Disputes: Refocusing on the Child*, 15 LEWIS & CLARK L. REV. 517, 529 (2011) (discussing the cultural preference for a parent's genetic link to a child).

¹³ Lewin, *supra* note 2.

¹⁴ Mark Hansen, *As Surrogacy Becomes More Popular, Legal Problems Proliferate*, ABA J. (Mar. 2011), http://www.abajournal.com/magazine/article/as_surrogacy_becomes_more_popular_legal_problems_proliferate.

¹⁵ See CAL. FAM. CODE § 7962 (2018) (regulating assisted reproduction agreements for gestational carriers).

¹⁶ See, e.g., ARIZ. REV. STAT. ANN. § 25-218 (2018) (gestation test); N.D. CENT. CODE § 14-18-05 (2018) (gestation test); *Belsito v. Clark*, 644 N.E.2d 760, 762 (Ohio Ct. Com. Pl. 1994) (genetics test).

states such as Washington use a best interests of the child test.¹⁷ And finally, other states have simply ignored the issue.¹⁸

Best interests of the child tests, which ignore the intent of the parties, have been criticized for creating too much uncertainty.¹⁹ On the other hand, intent tests have been challenged for ignoring the best interests of children and violating a variety of children's equal protection rights.²⁰ Meanwhile, state solutions that favor the genetic and gestational parents have been contested on equal protection and substantive due process grounds.²¹ In sum, none of the current tests appropriately consider the various complex interests at play in custody disputes.

This Note argues that California's intent test is unconstitutional, and that the State should use a two-part hybrid best interests test to resolve custodial disputes arising from surrogacy arrangements. Part I summarizes each of the different tests states have developed to confront custody disputes triggered by surrogacy arrangements. Part II argues that California's intent test is unconstitutional because it violates the child's right to equal protection, their liberty right to a relationship with their parent, and the Thirteenth Amendment right to be free of commodification. Finally, Part III will argue that California should adopt a two-part hybrid best interests test that incorporates elements of different state solutions and assigns points in an objective manner to determine custody.

I. DIVERGENT APPROACHES TO THE SAME ISSUE

The absence of federal regulation governing surrogacy arrangements has forced states to create widely conflicting solutions to the same issue. A survey of the different regulatory schemes governing custodial disputes arising from surrogacy arrangements reveals the troubling constitutional and moral issues that arise from each test.

¹⁷ WASH. REV. CODE ANN. § 26.26.260 (2018).

¹⁸ See Morrissey, *supra* note 7, at 497-99 (finding that states such as North Carolina, Oklahoma, and Rhode Island amongst others have no statutory or reported judicial authority concerning the validity of surrogacy arrangements).

¹⁹ Hisano, *supra* note 12, at 546.

²⁰ See *infra* Part II.

²¹ See, e.g., Austin Caster, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 503 (2011); Michelle Elizabeth Holland, *Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate*, 17 UC DAVIS J. JUV. L. & POL'Y 1, 16 (2013); Kyle Lee Holt, *Hoosier Mother?: Indiana's Inconsistent Surrogacy Law*, 48 VAL. U. L. REV. 1133, 1143-46 (2014).

A. *Best Interests Tests*

In 1988 the New Jersey Supreme Court decided the most prominent surrogacy case in United States history, *In re Baby M*.²² In *In re Baby M*, the intended parents were a married couple, Mr. and Mrs. Stern, that contracted with a surrogate, Mrs. Whitehead, to artificially inseminate her with Mr. Stern's sperm and carry the baby to term in exchange for \$10,000 upon delivery of the child.²³ The court held the surrogacy agreement was invalid because it violated the policy concern for the child's best interests, and applied a best interests test.²⁴ The court established the child's best interests as being determined by looking at not "what the child's best interests would be if some hypothetical state of facts" existed, but "what those best interests *are, today*."²⁵ Further, the test "does not contain within it any idealized lifestyle," but rather "the question boils down to a judgment, consisting of many factors, about the likely future happiness of a human being."²⁶

In 2014, the Supreme Court of Tennessee held that although surrogacy agreements are not against the public policy of the state, the agreement terms may not dispense with a judicial determination of the best interests of the child.²⁷ The court held that because courts are required by statute to determine the best interests of the child in a custody dispute, they "cannot use a private agreement to relieve the court of its obligation to conduct an independent inquiry . . . [a]ny agreement that purports to settle the question of a child's best interests is not binding on the court."²⁸ However, because surrogacy arrangements tend to promote permanence and stability in family relationships, courts may consider them (as a factor) when determining custody.²⁹

Similarly, in 2013 the Supreme Court of Wisconsin held that surrogacy contracts are valid to the extent that enforcement is not contrary to the child's best interests.³⁰ However, Wisconsin does not permit surrogates to give up their parental rights by agreement.³¹

²² 537 A.2d 1227 (N.J. 1988).

²³ *Id.* at 1234-35.

²⁴ *Id.* at 1246.

²⁵ *Id.* at 1258.

²⁶ *Id.* at 1260.

²⁷ *In re Baby*, 447 S.W.3d 807, 833 (Tenn. 2014).

²⁸ *Id.* at 828.

²⁹ *Id.* at 829.

³⁰ *In re F.T.R.*, 833 N.W.2d 634, 652 (Wis. 2013).

³¹ *Id.* at 651.

Washington has prohibited surrogacy contracts by statute and resolves custody disputes between surrogates and intended parents by looking at the best interests of the child.³²

The strength of the best interests test is that it prioritizes the interests of the child, which the United States Supreme Court has declared a compelling state interest.³³ Indeed, states that use a best interests test mostly reward custody to the intended parents.³⁴ This is compelling in light of the complaint that best interests tests discriminate against homosexual and infertile couples who are unable to guarantee custody of the babies born to surrogates.

Critics of the best interests test argue that the test is not only too subjective but also causes too much uncertainty at a sensitive time in a child's development.³⁵ Tennessee, for example, has a statute that gives the court fifteen factors to consider in making custody determinations.³⁶ These factors include the competency of parent's ability to provide children with necessities such as food, clothing, and medical care, the character of others who reside with the parent, and the parent's employment schedule.³⁷ Similarly, Washington's statute directs courts to evaluate factors including the disputed parent's employment schedule, their past and potential for future performance of parenting duties, and the emotional needs and development of the child.³⁸ Although best interests tests can be tedious and trigger uncertainty, they protect the state's compelling interest in protecting the best interests of children.

B. Gestation Tests

Other states, including Arizona and North Dakota, have determined that the gestational mother of a child should be rewarded custody in

³² WASH. REV. CODE § 26.26.230 (2018) (contracting for surrogacy is illegal); *id.* § 26.26.260 (custody disputes must be resolved in child's best interests).

³³ See *Ford v. Ford*, 371 U.S. 187, 192-94 (1962) (holding that a child's best interests are so compelling that states are not bound by the full faith and credit clause when there is a custody judgment that is based on a custody agreement without regard to the child's best interests).

³⁴ See, e.g., *In re Baby M*, 537 A.2d 1227, 1256-61 (N.J. 1988) (giving custody to intended parents because it was in the best interest of the child); *In re Baby*, 447 S.W.3d at 827, 840 (finding surrogacy contract enforceable because in best interests of child).

³⁵ Hisano, *supra* note 12, at 546.

³⁶ TENN. CODE ANN. § 36-6-106(a) (2018).

³⁷ *Id.*

³⁸ WASH. REV. CODE ANN. § 26.26.260 (2018). The factors to be considered are listed *id.* §§ 26.09.187(3), .191.

surrogacy disputes.³⁹ Advocates of gestation tests point to the important impact of the gestational mother's maternal hormones that transfer during pregnancy. These hormones impact the fetus and contribute to a child's size, proportions, development, cell differentiation, and congenital normality.⁴⁰

Supporters of gestation tests point to the forty-week "sweat equity" of pregnancy and the grueling labor that surrogates endure during their pregnancies.⁴¹ They argue that the intangible physical and emotional bond created between a mother and a child in the womb cannot be replicated by a commissioning couple.⁴² Moreover, a gestation test offers protections against unfair surrogacy contracts where the commissioning parent(s) or surrogate broker may try to take advantage of the surrogate.⁴³ Gestation tests give the surrogate mother rights after the pregnancy that do not exist in states that automatically award custody to the intended parents or in some cases the genetic parents.

However, gestational tests are problematic in that they completely gut the surrogacy arrangements. By automatically defaulting to the gestational mother, courts necessarily allow the surrogate to back out of the surrogacy agreement at any time, for whatever reason, and still keep the child. This adds uncertainty to surrogacies for intended parents, and does not always lead to outcomes in the best interests of the child.

C. Genetic Tests

States have also resolved surrogacy disputes by determining custody according to genetic relation. In Ohio, the natural parents of a baby born to a surrogate are whoever contributed the genetic material.⁴⁴

³⁹ ARIZ. REV. STAT. ANN. § 25-218 (2018); N.D. CENT. CODE § 14-18-05 (2018); Spivack, *supra* note 5, at 106 & 114 n.31.

⁴⁰ R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates*, 33 JURIMETRICS J. 387, 396-97 (1993).

⁴¹ See Ilana Hurwitz, *Collaborative Reproduction: Find the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127, 157 (2000) ("Pregnancy and childbirth are rigorous, physically taxing, and frequently utterly consuming until the child is born.").

⁴² See *id.* at 158-64.

⁴³ See Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 525 (1996).

⁴⁴ *Belsito v. Clark*, 644 N.E.2d 760, 768 (Ohio Ct. Com. Pl. 1994) (holding that when a child is delivered to a gestational surrogate the people that provided the genetic materials are the natural parents).

The genetic connection between a parent and a child is important because it serves as a blueprint for a child's characteristics, emotional traits, intelligence, and health.⁴⁵ Indeed, the genetic connection between a parent and a child has taken on a "divine reverence" in Western society.⁴⁶ The "genealogical bewilderment" theory also supports determining custody from surrogacy disputes through genetic tests. This theory posits that adopted children who lack access to their biological families occasionally struggle forming an individual identity.⁴⁷

However, this test cannot resolve traditional surrogacy disputes where the intended father is the sperm donor and the surrogate is the genetic mother, as the owner of the egg. Furthermore, the Supreme Court has held that a mere biological connection between a parent and a child does not establish a constitutional basis for protection.⁴⁸ A biological connection only offers a natural parent the opportunity to develop a relationship with their child and to "make uniquely valuable contributions to the child's development."⁴⁹ Therefore, while a parent's genetic connection to a child is important it can only be a factor in determining custody.

Gestation and genetics tests also share constitutional infirmities. First, they violate the equal protection guarantees of homosexual couples and women who medically cannot carry a child.⁵⁰ And second, they violate the Equal Protection Clause.⁵¹ Since both the genetic and gestational parents have a legal claim to parental rights, automatically awarding the newborn to one over the other does not take into account the best interests of a newborn. Therefore, much like pure intent tests, genetic and gestation tests situate children born to surrogates differently than those born traditionally. Lastly, both tests violate the substantive due process rights of both the surrogate and the intended parents to have a private ordering of their reproductive

⁴⁵ See SCOTT B. RAE, *THE ETHICS OF COMMERCIAL SURROGATE MOTHERHOOD: BRAVE NEW FAMILIES?* 80-83 (1994).

⁴⁶ Hisano, *supra* note 12, at 529 (discussing the cultural preference for a genetic link to the child).

⁴⁷ Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 217 (1995).

⁴⁸ *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

⁴⁹ *Id.* at 262.

⁵⁰ See *Soos v. Super. Ct.*, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994); see also Jennifer L. Laporte, *Connecticut's Intent Test to Determine Parentage: Equality for Same-Sex Couples at Last*, 26 QUINNIPIAC PROB. L.J. 291, 291-92 (2013); Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J. FAM. L. 585, 602, 610 (1989).

⁵¹ See *infra* Sections II.A.1-4.

affairs.⁵² While this can be overcome by a compelling state interest, both tests nevertheless must fail strict scrutiny because genetic and gestational links are not sufficient compelling interests.

In sum, opponents of the best interests, gestation, and genetic tests all complain they violate the intended parent's equal protection guarantees because they discriminate against homosexual couples, infertile couples, and single parents that cannot provide all genetic and gestational materials necessary to create a baby.⁵³ Opponents of all three tests also criticize them for infringing on their private right to voluntarily enter into contracts and their constitutionally recognized right to privacy in making decisions about reproduction and child rearing.⁵⁴

D. Section 7962 of the California Family Code and Intent Tests

In 2012, California passed section 7962 of the California Family Code governing surrogacy arrangements.⁵⁵ The statute dictates that a gestational surrogacy contract is valid and gives custody to the intended parents as long as the contract meets certain requirements including: 1) the date on which the agreement was executed; 2) the persons from which the gametes were donated unless anonymously donated; 3) the identity of the intended parents; and 4) disclosure of how the intended parents will provide for the medical care of the surrogate and newborn(s).⁵⁶ If all requirements of the statute are met

⁵² See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1279 n.10 (D. Utah 2002) (holding that a woman's right to have a baby must be at least as strong as the right to not have one); see also Coleman, *supra* note 43, at 525; Alayna Ohs, *The Power of Pregnancy: Examining Constitutional Rights in a Gestational Surrogacy Contract*, 29 HASTINGS CONST. L.Q. 339, 350 (2002).

⁵³ See Laporte, *supra* note 50; Russell, *supra* note 50; see also *J.R.*, 261 F. Supp. 2d at 1293 (holding that a statute awarding custody to a gestational surrogate violates equal protection guarantee of intended parents); Soos, 897 P.2d at 1361 (holding that Arizona statute granting surrogate custody as legal mother was a violation of equal protection of intended parents).

⁵⁴ See *J.R.*, 261 F. Supp. 2d at 1279 n.10 (suggesting that state burdens on procreation methods must meet same scrutiny as state burden on abortion because both infringe on fundamental right to privacy in procreative choices); *In re Paternity & Custody of Baby Boy A*, No. A07-452, 2007 WL 4304448, at *4-6 (Minn. Ct. App. Dec. 11, 2007) (upholding surrogacy agreement because it fulfills contractual requirements of offer, acceptance, and consideration, was not coerced, and is not against Minnesota public policy).

⁵⁵ CAL. FAM. CODE § 7962 (2018).

⁵⁶ *Id.* § 7962(a).

the contract is presumed valid and custody lies with the intended parent(s).⁵⁷

The statute codified a long line of California jurisprudence establishing an intent test.⁵⁸ In 1993, the California Supreme Court held in *Johnson v. Calvert*⁵⁹ that a surrogacy contract was valid and both Mrs. Calvert (the intended mother) and Ms. Johnson (the surrogate mother) had claims to be the legal mother.⁶⁰ However, the court also held that because Mrs. Calvert was the intended mother, genetically related to the baby, and married to the genetic father of the baby, she had a greater claim to motherhood of the baby than Ms. Johnson.⁶¹ Then, in 1998, the California Court of Appeals held that under *Johnson* a tie between an intended parent and a surrogate parent would be resolved in favor of the intended parent.⁶²

Connecticut uses an intent test similar to California's.⁶³ In 2011, the Connecticut Supreme Court held that an intended parent to a valid surrogacy contract is the legal parent, regardless of their genetic or gestational relationship to the newborn.⁶⁴ Minnesota courts have developed a closely related contract test.⁶⁵ The courts have found that surrogacy agreements are valid if they: 1) reflect the intentions of the parties; and 2) are not the product of coercion.⁶⁶ And Florida has a statute that allows surrogacy contracts, but only if the intended parents are married.⁶⁷

Supporters of intent-based tests point to positives such as providing a bright-line, the avoidance of uncertainty, and conformance with contractual principles.⁶⁸ In addition they argue that the intended

⁵⁷ *Id.* § 7962(i).

⁵⁸ See *Johnson v. Calvert*, 851 P.2d 776, 780-83 (Cal. 1993) (finding the surrogacy contract valid); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 288 (Cal. Ct. App. 1998). *But cf. In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 900-01 (Cal. Ct. App. 1994) (holding surrogacy contracts valid but unenforceable without contract acquiring consent from the birth mother).

⁵⁹ 851 P.2d. 776.

⁶⁰ *Id.* at 780-83.

⁶¹ *Id.* at 782.

⁶² *Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 288.

⁶³ See Laporte, *supra* note 50, at 305-06.

⁶⁴ *Raftopol v. Ramey*, 12 A.3d 783, 793 (Conn. 2011).

⁶⁵ Spivack, *supra* note 5, at 105.

⁶⁶ The court also found that surrogacy agreements are not against the public policy of Minnesota. See *In re Paternity & Custody of Baby Boy A*, No. A07-452, 2007 WL 4304448, at *4-5, 7 (Minn. Ct. App. Dec. 11, 2007).

⁶⁷ FLA. STAT. ANN. § 742.15 (2018).

⁶⁸ See Teresa Abell, *Gestational Surrogacy: Intent-Based Parenthood in Johnson v. Calvert*, 45 MERCER L. REV. 1429, 1435-36 (1994).

parents are the cause-in-fact of the newborn. While genetic materials and a gestational womb are necessary for the production of a child, they are interchangeable. Without the intended parent's desire to bring a child into the world the conception would never have come to fruition.⁶⁹ Commentators have also argued that intended parents who enter surrogacy arrangements have a deep desire to parent, which usually translates to them successfully fulfilling their parental duties.⁷⁰ Further, intent tests protect the rights of homosexual and infertile couples, as well as single parents, to have biological children. However, critics of intent tests argue that they violate the equal protection rights of newborns, deprive them of their liberty right to a relationship with their mother, and infringe on their guarantee against commodification.⁷¹

II. ARGUMENT

A. *Section 7962 of the California Family Code Violates the Equal Protection Rights of Newborns*

The Equal Protection Clause of the Fourteenth Amendment establishes that all persons similarly circumstanced must be treated alike.⁷² Thus, when a state acts to protect one part of the population it must provide that same protection to all unless there is a legitimate state interest for the exclusion.⁷³ In California, different standards govern custody disputes concerning children born in surrogate

⁶⁹ See *id.* at 1435-37.

⁷⁰ See, e.g., Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 281 (1995); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397 (1990).

⁷¹ See *infra* Part II.

⁷² See *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding that the Oklahoma statute that established different drinking age for males and females violated the equal protection clause); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding "separate but equal" schools unconstitutional because they deny children equal protection under the laws); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (asserting that "a discriminatory tax law cannot be sustained . . .").

⁷³ See *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 619-21 (1973) (holding that a statute that gave health benefits to legitimate but not illegitimate children violated Equal Protection Clause); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165, 172 (1972) (holding Louisiana workmen's compensation statute that relegated illegitimate children to a lower priority than legitimate children violated equal protection guarantees); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding poll taxes unconstitutional).

pregnancies and those born in traditional pregnancies.⁷⁴ Custody of children born in traditional pregnancies is determined using a best interests of the child test.⁷⁵ Disputes over custody of children born in surrogacy arrangements are resolved by an intent test.⁷⁶ Therefore, unless there is a legitimate state interest in excluding newborns born in surrogate pregnancies from the protections afforded to those born in traditional pregnancies, section 7962 of the California Family Code violates the Equal Protection Clause.

1. Historical Uses of the Equal Protection Clause to Protect Children

Historically, the Equal Protection Clause has been asserted to ensure rights for disadvantaged groups of children treated unequally by states.⁷⁷ In the seminal *Brown v. Board of Education*,⁷⁸ the U.S. Supreme Court held that “separate but equal” education was unconstitutional because “segregation of colored children in public schools has a detrimental effect upon the colored children” and “[deprives] them of some of the benefits they would receive in a racial[ly] integrated school system.”⁷⁹ The Court concluded that the unequal treatment “deprived [black children] of the equal protection of the laws guaranteed by the Fourteenth Amendment.”⁸⁰

The Supreme Court has extended the Equal Protection Clause to apply to statutes that discriminate against illegitimate children. In 1968, the Court held that a Louisiana statute defining “legitimate child” for purposes of damage recovery was unconstitutional because it constituted an “invidious discriminat[ion] against a particular class” and children’s legitimacy is of “no action, conduct, or demeanor of

⁷⁴ Compare CAL. FAM. CODE § 7962 (2018) (requiring custody go to intended parents if certain contractual prerequisites are met), with CAL. FAM. CODE § 3020 (2018) (establishing best interests test for custody disputes in traditional pregnancies), and CAL. FAM. CODE § 8612 (2018) (establishing best interests test for adoption proceedings).

⁷⁵ CAL. FAM. CODE § 3020; see also CAL. FAM. CODE § 8612.

⁷⁶ CAL. FAM. CODE § 7962.

⁷⁷ See *N.J. Welfare Rights Org.*, 411 U.S. at 619-21 (holding that a statute that gave health benefits to legitimate but not illegitimate children violated Equal Protection Clause); *Weber*, 406 U.S. at 165 (holding Louisiana workmen’s compensation statute that relegated illegitimate children to a lower priority than legitimate children violated equal protection guarantees); *Brown*, 347 U.S. at 495 (holding “separate but equal” schools unconstitutional because they deny children equal protection under the laws).

⁷⁸ 347 U.S. 483.

⁷⁹ *Id.* at 494.

⁸⁰ *Id.* at 495.

theirs[.]”⁸¹ In the years following *Levy*, the Supreme Court has held that statutes depriving illegitimate children of the same health benefits, workmen’s compensation benefits, and child support as legitimate children are unconstitutional.⁸²

2. California Custody Laws for Traditional Pregnancies

Under California law, custody disputes of children born in traditional pregnancies are resolved by determining the best interests of the child.⁸³ Section 3020 of the California Family Code “declares that it is the public policy of [California] to assure that the health, safety, and welfare of children shall be the court’s primary concern in determining the best interest of children when making any orders regarding the physical or legal custody . . . of children.”⁸⁴ Section 3011 of the California Family Code provides considerations including the health, safety, and welfare of the child, to serve as guidelines for the judiciary when determining the best interests of a child.⁸⁵ And section 3040(d) of the California Family Code states that when a child has more than two parents, custody should be allocated based on the best interests of the child as provided in sections 3011 and 3020.⁸⁶

The California judiciary has affirmed the legislative intent of California’s statutory scheme governing custody disputes for children of traditional pregnancies.⁸⁷ The Supreme Court of California has held that “the overarching concern [of the scheme] is the best interest of the child.”⁸⁸ The statutory scheme has been found to afford the trial court and the family “the widest discretion to choose a parenting plan that is in the best interest of the child.”⁸⁹ If parents are unable to come to a custody agreement through mediation, a child’s best interests are

⁸¹ *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

⁸² *N.J. Welfare Rights Org.*, 411 U.S. at 619-21 (health benefits); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (child support); *Weber*, 406 U.S. at 165 (workmen’s compensation).

⁸³ CAL. FAM. CODE §§ 3011, 3020, 3040 (2018); *see also In re Marriage of Brown & Yana*, 127 P.3d 28, 32 (Cal. 2006); *Keith R. v. Superior Court*, 96 Cal. Rptr. 3d 298, 301 (Cal. Ct. App. 2009).

⁸⁴ CAL. FAM. CODE § 3020.

⁸⁵ CAL. FAM. CODE § 3011.

⁸⁶ CAL. FAM. CODE § 3040(d).

⁸⁷ *See In re Marriage of Brown*, 127 P.3d at 32; *In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996); *Keith R.*, 96 Cal. Rptr. 3d at 301; *In re Marriage of Goodarzirad*, 230 Cal. Rptr. 203, 206 (Cal. Ct. App. 1986).

⁸⁸ *In re Marriage of Brown*, 127 P.3d at 32 (citing *Montenegro v. Diaz*, 27 P.3d 289, 293 (Cal. 2001)).

⁸⁹ *In re Marriage of Burgess*, 913 P.2d at 478 (citing CAL. FAM. CODE § 3040(b)).

determined by a judge who considers all relevant factors, including those listed in section 3011.⁹⁰ The emphasis on the best interests of the child is so strong that a traditional parent cannot even voluntarily relinquish their parental rights by stipulation without an inquiry into whether the termination was in the child's best interests.⁹¹

3. California Custody Laws for Adopted Children

Section 8612 of the California Family Code mandates that adoption placements may only occur if in the best interests of the child.⁹² The California judiciary has confirmed the best interests test for adoption disputes.⁹³ The California Court of Appeal has held that "the cardinal rule of adoption proceedings" is that "the court consider what is for the best interests of the child."⁹⁴ The court can never ignore the child's best interests, regardless of any "preliminary action [the child's] parent or parents may have taken."⁹⁵ Further, the child's welfare is "the controlling force in directing its custody, and the courts will always look to this rather than to the whims and caprices of the parties."⁹⁶

4. Section 7962 Treats Similarly Situated Children Differently

Babies born to surrogates do not receive the same treatment in custody disputes as babies born in traditional pregnancies.⁹⁷ As stated above, if the surrogacy contract meets certain statutory requirements it is deemed valid and custody is automatically awarded to the intended parents.⁹⁸ This stands in stark contrast to the laws governing

⁹⁰ *Montenegro v. Diaz*, 27 P.3d 289, 293 (Cal. 2001).

⁹¹ See *In re Marriage of Jackson*, 39 Cal. Rptr. 3d 365, 372 (2006); *Goodarzirad*, 230 Cal. Rptr. at 206.

⁹² CAL. FAM. CODE § 8612 (2018).

⁹³ See *Adoption of Matthew B.*, 284 Cal. Rptr. 18, 30-31 (Cal. Ct. App. 1991); *In re Laws' Adoption*, 20 Cal. Rptr. 64, 66-67 (Cal. Dist. Ct. App. 1962); *In re Barents*, 222 P.2d 488, 492 (Cal. Dist. Ct. App. 1950).

⁹⁴ *Laws' Adoption*, 20 Cal. Rptr. at 66-67.

⁹⁵ *In re Barents*, 222 P.2d at 491-92.

⁹⁶ *Adoption of Matthew B.*, 284 Cal. Rptr. at 24-25 (citing *Crater v. Crater*, 67 P. 1049, 1050 (Cal. 1902)).

⁹⁷ Compare CAL. FAM. CODE § 7962 (2018) (requiring custody go to intended parents if certain contractual prerequisites are met), with CAL. FAM. CODE § 3020 (2018) (establishing best interests test for custody disputes in traditional pregnancies), and CAL. FAM. CODE § 8612 (establishing best interests test for adoption proceedings).

⁹⁸ CAL. FAM. CODE § 7962; see also *Adoption of A.N.*, No. G049050, 2014 WL

traditional pregnancy custody disputes and adoption proceedings which both emphasize the best interests of the child over parental rights.⁹⁹

California protects the best interests of the classes of children born in traditional pregnancies and during adoption proceedings.¹⁰⁰ Yet with the class of children born to surrogates, California promotes the best interests of intended parents at the expense of the best interests of the children. This disparity violates the Equal Protection Clause, which mandates that states must treat alike all those similarly situated.¹⁰¹

The Court found separate but equal schools unconstitutional because they had a detrimental effect on minority students.¹⁰² The Court has likewise found disparate standards governing legitimate and illegitimate children to be an invidious discrimination against a particular class, as the children's illegitimacy was of no fault of their own.¹⁰³ Granting custody to the intended parents not only treats children born to surrogates differently than those born traditionally, but is potentially detrimental to those children. It creates a situation where a parent who is clearly not in the child's best interests may gain custody to the child's, surrogate's, and intended parent's benefit. Therefore, it discriminates against the group of children born to surrogates.

6428440, at *8 (Cal. Ct. App. Nov. 17, 2014) (holding a surrogacy contract valid as “[c]ompliance with all section 7962’s requirements rebuts the presumption the gestational carrier surrogate, her spouse, or partner is a parent to any children.”).

⁹⁹ Compare CAL. FAM. CODE § 7962 (requiring custody go to intended parents if certain contractual prerequisites are met), with CAL. FAM. CODE § 3020 (establishing best interests test for custody disputes in traditional pregnancies), and CAL. FAM. CODE § 8612 (establishing best interests test for adoption proceedings).

¹⁰⁰ CAL. FAM. CODE § 3020 (establishing best interests test for custody disputes in traditional pregnancies); CAL. FAM. CODE § 8612 (establishing best interests test for adoption proceedings); see also *In re Marriage of Brown & Yana*, 127 P.3d 28, 32 (Cal. 2006) (“[T]he overarching concern is the best interest of the child.”); see, e.g., *Adoption of Matthew B.*, 284 Cal. Rptr. at 29-30 (holding that “the child’s welfare is ‘the controlling force in directing its custody . . .’”).

¹⁰¹ See *Craig v. Boren*, 429 U.S. 190, 210 (1976) (holding that the Oklahoma statute that established different drinking ages for males and females violated the equal protection clause); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding “separate but equal” schools are unconstitutional because they deny children equal protection under the laws); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

¹⁰² *Brown*, 347 U.S. at 494.

¹⁰³ *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

The facts of a case currently pending in the California Superior Court provide an illustration of how a pure intent test, such as section 7962, may not always be in the best interests of the child.¹⁰⁴ In *Cook v. Harding*,¹⁰⁵ Melissa Cook contracted with C.M. to serve as a gestational surrogate.¹⁰⁶ C.M. is a 50 year old postal worker who is deaf and lives with his elderly parents.¹⁰⁷ After all three implanted embryos became successful pregnancies, C.M. expressed concerns whether he would be able to take care of all three babies.¹⁰⁸ As the pregnancy progressed it became clear that C.M. had depleted his life savings paying for the surrogacy arrangement.¹⁰⁹ C.M., citing his financial concerns and the high-risks of pregnancies involving triplets, demanded Cook abort one of the pregnancies.¹¹⁰ When she refused, offering to adopt one of the babies herself, C.M. filed section 7962 paperwork to terminate Cook's parental rights.¹¹¹ Under California law, once the babies were born they were placed in C.M.'s custody and Cook was unable to see them.¹¹² Cook filed suit in California state court seeking parental rights for herself and challenging the constitutionality of section 7962.¹¹³ Important to note here, if the triplets were born in a traditional pregnancy they would have received an adversarial hearing where the court would have determined the best interests of the children in assessing to whom to award custody.¹¹⁴ However, under section 7962, the court completely ignored the interests of the triplets and automatically awarded C.M. custody despite his lack of financial resources, his disability, the difficulty of raising three children as a single parent, and the fact that

¹⁰⁴ *Cook v. Harding*, 190 F. Supp. 3d 921 (C.D. Cal. 2016).

¹⁰⁵ *Cook*, 190 F. Supp. 3d 921.

¹⁰⁶ *Id.* at 928.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 929.

¹¹² *See id.*

¹¹³ *See id.* at 929-30.

¹¹⁴ *See Montenegro v. Diaz*, 27 P.3d 289, 293 (Cal. 2001) (holding that in a traditional pregnancy if parents are unable to come to an agreement custody is to be determined by an adversarial hearing considering all relevant factors); *Adoption of Matthew B.*, 284 Cal. Rptr. 18, 29-30 (Cal. Ct. App. 1991) (holding that in custody disputes concerning adopted children, the court will look towards the best interests of the child); *see also* CAL. FAM. CODE § 3020 (2018) (establishing best interests test for custody disputes in traditional pregnancies); CAL. FAM. CODE § 8612 (2018) (establishing best interests test for custody disputes concerning adopted children).

he lives with his elderly parents.¹¹⁵ The court failed to even inquire whether C.M. was capable of raising the children.¹¹⁶ This case illustrates the reality that under California law, anyone can contract for a child. Unfortunately, regardless of their parental fitness.

It is impossible to reconcile the Equal Protection Clause with California's disparate treatment of children born in traditional pregnancies and adoption proceedings with California's treatment of babies born to surrogates. However, a state can exclude a particular class because they have a legitimate state interest in doing so.¹¹⁷ Thus, if California can prove a legitimate state interest in excluding children born to surrogates from the same rights as those children similarly situated, then section 7962 can pass the constitutional criteria.

5. Despite Equal Protection and Due Process Concerns, Courts Have Held that the Best Interests of Children Is a More Compelling Factor

Shifting from an intent-based test to a genetic or a gestation test violates the equal protection rights of homosexuals and people who have genetic issues preventing them from bearing babies traditionally. Legal scholars have argued that homosexuals and other infertile couples are similarly situated to those who can have babies traditionally, and it would be a violation of their equal protection rights to deny them an avenue to have biological children.¹¹⁸ Further, the question of whether a statute violates the Equal Protection Clause is subject to strict scrutiny if the statute involves a suspect class or

¹¹⁵ See *Cook*, 190 F. Supp. 3d at 929 (stating that after C.M. filed the requisite paperwork under section 7962 the court granted his petition to terminate Cook's legal relationship with the children). No consideration of the children's best interests was made in granting the petition. All that was necessary was the filing of the requisite paperwork. See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 619-21 (1973) (holding that a statute that gave health benefits to legitimate but not illegitimate children violated Equal Protection Clause).

¹¹⁸ See Krista Sirola, *Are You My Mother? Defending the Rights of Intended Parents in Gestational Surrogacy Arrangements in Pennsylvania*, 14 AM. U. J. GENDER SOC. POL'Y & L. 131, 154 (2006); Jamie L. Zuckerman, *Extreme Makeover — Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements*, 32 NOVA L. REV. 661, 678 (2008); see also U.S. CONST. amend. XIV, § 1. But see *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 54 (2001) (holding that because fathers and mothers are not similarly situated with regard to proof of biological parenthood, the imposition of different rules for each is not constitutionally violative).

impinges on a fundamental right.¹¹⁹ The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment protects the fundamental right to parenthood.¹²⁰ It has also held that parents have a fundamental right to procreate and raise their children the way they see fit.¹²¹ Thus, it is no surprise to see that some state and district courts have cited the fundamental right to raise children when holding state bans on surrogacy unconstitutional.¹²² For example, a Utah District Court struck down a statute banning surrogacy arrangements because it interfered with the intended parent's fundamental right to bear children.¹²³ The Arizona Court of Appeals also struck down a statute governing surrogacies, because it allowed the sperm donor to prove paternity but did not allow the egg donor to prove maternity.¹²⁴

However, burdens on the fundamental right to bear and raise children how one pleases may be justified by a compelling state interest.¹²⁵ Indeed, the California Court of Appeal has held that "establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights."¹²⁶ The United States Supreme Court has held that a child's best interests are

¹¹⁹ *Soos v. Superior Court*, 897 P.2d 1356, 1359 (Ariz. Ct. App. 1994).

¹²⁰ See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The right[] . . . to raise one's children [has] been deemed essential."); *May v. Anderson*, 345 U.S. 528, 533 (1953) (finding that the right to bear children is "far more precious" than property rights); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding Oklahoma eugenics statute unconstitutional because bearing children is a "basic [civil] right of man"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding the right to raise and conceive one's children "essential").

¹²¹ See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977) (holding New York statute banning the sale of contraceptives to those under sixteen years old unconstitutional because it infringes on the private right to make procreative choices); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925) (holding Oregon statute making public education compulsory unconstitutional because it "unreasonably interferes" with liberty of parents to direct the upbringing of their children); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (striking down Texas abortion statute as "undue burden" on liberty right to control procreation).

¹²² See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1277-79 (D. Utah 2002); *Soos*, 897 P.2d at 1360-66.

¹²³ *J.R.*, 261 F. Supp. 2d at 1296 (holding statute imposed an undue burden on the parents).

¹²⁴ *Soos*, 897 P.2d at 1360-61. However, the Arizona legislature has not repealed the statute, and the status of surrogacy arrangements remains unclear in the state.

¹²⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877-78 (1992).

¹²⁶ *County of Shasta v. Caruthers*, 38 Cal. Rptr. 2d 18, 22 (Cal. Ct. App. 1995) (quoting *Ruddock v. Ohls*, 91 Cal. App. 3d 271, 277-78 (Cal. Ct. App. 1979)).

so compelling that states are not bound by the Full Faith and Credit Clause when a custody judgment is based on a custody agreement without regard to the child's best interests.¹²⁷

Further, parents in traditional pregnancies also have a fundamental parental right. However, in custody disputes they are subjected to a best interests of the child standard.¹²⁸ Intended parents should not have a right to custody at the expense of the child's best interests when traditional parents do not. Therefore, the state's compelling interest in protecting the best interests of children must outweigh the legitimate concern for the equal protection and due process rights of intended parents.

B. Section 7962 of the California Family Code Violates Both State and Federal Law Precluding Commodification of Human Beings

Section 7962 of the California Family Code also violates one of the most basic liberties guaranteed by the constitution, the right to be free from commodification. The Thirteenth Amendment guarantees the right of newborns to be free from commodification federally, and sections 181 and 273 of the California Penal Code prohibit commodification within the state.¹²⁹ Section 7962 essentially establishes a state-sanctioned marketplace of babies.¹³⁰ Therefore, unless there is a compelling reason that outweighs the state's interest in banning commodification of newborns, section 7962 is unconstitutional under federal law and violates established California law.

1. Section 7962 Violates Federal Law Precluding Commodification of Human Beings

The Thirteenth Amendment to the United States Constitution prohibits slavery and involuntary servitude.¹³¹ In 1867, Congress

¹²⁷ Ford v. Ford, 371 U.S. 187, 193-94 (1962).

¹²⁸ See Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The right . . . to raise one's children [has] been deemed 'essential' . . ."); May v. Anderson, 345 U.S. 528, 533 (1953) (finding that the right to care for one's children is "far more precious" than property rights); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding Oklahoma eugenics statute unconstitutional because bearing children is a "basic civil [right] of man"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding the right to raise and conceive one's children "essential").

¹²⁹ U.S. CONST. amend. XIII; CAL. PENAL CODE § 181 (2018); CAL. PENAL CODE § 273 (2018).

¹³⁰ See CAL. FAM. CODE § 7962.

¹³¹ U.S. CONST. amend. XIII; William Wirt Howe, *The Peonage Cases*, 4 COLUM. L. REV. 279, 279 (1904); see also Lorraine Stone, *Neoslavery — "Surrogate" Motherhood*

passed the Anti-Peonage Act of 1867 pursuant to its power to enforce the Thirteenth Amendment, outlawing the practice of holding in voluntary or involuntary service any human being in liquidation of any debt or obligation.¹³²

The United States Supreme Court has held that forced labor in consideration for a debt violates the Thirteenth Amendment and the Anti-Peonage Act.¹³³ In *Bailey v. Alabama*,¹³⁴ the defendant was an African American farm worker who was paid an advance and did not complete the work he contracted to do.¹³⁵ Under Alabama peonage laws he was indentured to his creditor until his debt was repaid.¹³⁶ Writing for the court, Justice Hughes noted that “the words involuntary servitude have a larger meaning than slavery,” and held the Alabama peonage statute offended the prohibition of the Thirteenth Amendment to the United States Constitution against involuntary servitude and against the provisions forbidding peonage.¹³⁷

Section 7962 of the California Family Code sanctions a marketplace where babies can be bought and sold to the highest bidder if certain prerequisites are met.¹³⁸ This is a blatant violation of the Thirteenth Amendment’s protection against servitude. The newborn is “given” to the intended parents, who gain possession of the child in exchange for consideration. As one commentator has observed, surrogacy is state-sanctioned “[contracting] to produce, buy, and sell a person[.]”¹³⁹ Pure intent-based surrogacy arrangements, as sanctioned by section 7962, can be analogized to Alabama’s peonage statute because they grant one human being possession over another in exchange for valuable consideration. Therefore, section 7962 is unconstitutional as a violation of the Thirteenth Amendment and the federal Anti-Peonage Act.

Contracts v. The Thirteenth Amendment, 6 L. & INEQ. 63, 64 (1988) (“As the ink dried on General Lee’s surrender, two parties could never again contract with each other for the purchase and sale of a third.”).

¹³² Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 42 U.S.C. § 1994 (2018) and 18 U.S.C. § 1581 (2018)).

¹³³ *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

¹³⁴ *Id.* at 219.

¹³⁵ *Id.* at 228-30.

¹³⁶ *Id.* at 227-28.

¹³⁷ *Id.* at 241, 245.

¹³⁸ See CAL. FAM. CODE § 7962 (2018) (listing what all surrogacy agreements must contain).

¹³⁹ Stone, *supra* note 131, at 65.

2. Section 7962 Violates State Law Precluding Commodification of Children

Section 181 of the California Penal Code declares that any person “who buys, or attempts to buy, any person, or pays money, or delivers anything of value, to another, in consideration of having any person placed in his or her custody, or under his or her power or control” is guilty of a felony under California law.¹⁴⁰ For example, a father who offered to give his daughter to a family for \$90,000 was guilty under the statute even though the father anticipated his daughter would be adopted regardless.¹⁴¹ Section 7962 of the California Family Code clearly violates section 181 of the Penal Code because it sanctions the payment of consideration by one person in exchange for having another person placed under their custody. Therefore, section 7962 is a violation of state law prohibiting the commodification of human beings.

Section 273 of the California Penal Code prohibits and punishes as a misdemeanor any payment for the placement of an adoption or for consent to an adoption.¹⁴² California is not alone as every state has laws prohibiting payment for consent to an adoption.¹⁴³ The Michigan Court of Appeals has found that consideration in exchange for surrogacy adoption placement violates their statute prohibiting monetary adoption transactions.¹⁴⁴ In *Doe v. Kelley*,¹⁴⁵ intended parents sought approval for an arrangement where the intended father would give consideration to artificially inseminate a woman in exchange for her prior consent to the intended parents adopting the child.¹⁴⁶ The court found that Michigan’s statute prohibiting payment in exchange for consent for adoption did “not directly prohibit [the intended parents] from having the child as planned.”¹⁴⁷ However, it found that the statute did “preclude [the intended parents] from paying consideration in conjunction with their use of the state’s adoption procedures.”¹⁴⁸

¹⁴⁰ CAL. PENAL CODE § 181.

¹⁴¹ *People v. Daniel*, 241 Cal. Rptr. 3, 6 (Cal. Ct. App. 1987).

¹⁴² CAL. PENAL CODE § 273.

¹⁴³ See, e.g., MASS. GEN. LAWS ch. 210, § 11A (2018); *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988); *In re Adoption of Paul*, 550 N.Y.S.2d 815, 817 (N.Y. Fam. Ct. 1990).

¹⁴⁴ *Doe v. Kelley*, 307 N.W.2d 438, 441 (Mich. Ct. App. 1981).

¹⁴⁵ *Kelley*, 307 N.W.2d 438.

¹⁴⁶ *Id.* at 440.

¹⁴⁷ *Id.* at 441.

¹⁴⁸ *Id.*

Michigan is not the only state to have noted the inherent contradiction between surrogacy arrangements and state statutes prohibiting payment in exchange for adoption placement. In *In re Baby M*,¹⁴⁹ in a finding that was left undisturbed on appeal, the trial court found that “[t]he 13th Amendment to the United States Constitution is still valid law. The law of adoption in New Jersey does prohibit the exchange of any consideration for obtaining a child.”¹⁵⁰ However, the *In re Baby M* trial court reconciled this contradiction by stating that Mr. Stern was not purchasing a child because it was biologically his and one cannot pay for what is already his.¹⁵¹ And in New York, a family court judge found that a surrogate parenting agreement violated the state’s prohibition against compensation in exchange for surrender of a child.¹⁵² Purchasing a child through a surrogate looks a lot like purchasing a child for adoption from their birth parent.

Section 7962 of the California Family Code, like the proposed surrogacy arrangements in New York, New Jersey, and Michigan, is diametrically opposed to section 273 of the California Penal Code, which prohibits payment in exchange for adoption. It sanctions payment in exchange for placement of a newborn even over the objections of the birth mother. Therefore, section 7962 is a violation of state law precluding payment for placement in adoption.

Supporters might argue that surrogacy is distinguished from adoption because there is a biological connection between the intended parents and the newborn.¹⁵³ However, as Cyril C. Means Jr. has noted, this harkens back to the antebellum South where free blacks would frequently purchase their offspring sired with enslaved women from their owners.¹⁵⁴ In fact, free black men with infertile wives would often rent slaves from their owners in a transaction similar to surrogacy arrangements today.¹⁵⁵ The Thirteenth Amendment was passed after the Civil War to preclude these very arrangements where people were bought and sold.¹⁵⁶ Therefore, any

¹⁴⁹ 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987).

¹⁵⁰ *Id.* at 1157.

¹⁵¹ *Id.*

¹⁵² *In re Adoption of Paul*, 550 N.Y.S.2d 815, 817 (N.Y. Fam. Ct. 1990).

¹⁵³ See *In re Baby M*, 525 A.2d at 1157.

¹⁵⁴ Cyril C. Means, Jr., *Surrogacy v. The Thirteenth Amendment*, 4 N.Y.L. SCH. HUM. RTS. ANN. 445, 447-50 (1987).

¹⁵⁵ *Id.*

¹⁵⁶ U.S. CONST. amend. XIII; see also Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1180 (2014) (arguing that if consent is withdrawn over the

argument that intended parents are simply purchasing what is theirs is precluded by the Thirteenth Amendment.

Publicized anecdotes of the dark side of surrogacy arrangements help illustrate how an option that might seem like a panacea to infertile couples can lead to sinister results. For example, in California, a man sought to employ six birth mothers and produce six babies.¹⁵⁷ However, he wanted the option to pick which two of the six babies he wanted, and told the agency they could sell the remaining four.¹⁵⁸ An Australian couple hired a woman from Thailand to act as a surrogate, and she later gave birth to twins.¹⁵⁹ When one of the babies had down syndrome, the couple only took the non-disabled child.¹⁶⁰ While the California agency turned down the man seeking to pick and choose newborns, the Thai birthmother was left to care for the disabled child.¹⁶¹ These stories illustrate the rationale behind the prohibition against payment in exchange for adoption placement that each of the fifty states have enacted. It is easy to imagine the potential consequences when adults have an unfettered right to contract for possession of children.

3. Although Freedom of Contract Is a Bedrock of California Contract Law It Is a Qualified Rather than Absolute Right

Supporters of surrogacy arrangements might argue that as contracts they must be protected under freedom of contract principles.¹⁶² Indeed, it is true that a bedrock principle of contract law in California has always been that competent parties should have the utmost liberty of contract to arrange their affairs according to their own judgment so long as they do not contravene positive law or public policy.¹⁶³

course of a surrogacy arrangement surrogates are then held in a form of involuntary servitude in direct violation of the Thirteenth Amendment); Mrinal Vijay, *Commercial Surrogacy Arrangements: The Unresolved Dilemmas*, 3 U.C. LONDON J.L. & JURIS. 200, 230 (2014). *See generally* Means, Jr., *supra* note 154 (discussing the practice of renting women for pregnancies in the ante-bellum South and how the enactment of the Thirteenth Amendment effectively ended the practice).

¹⁵⁷ Field, *supra* note 156 at 1170.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1170-71.

¹⁶⁰ *Id.* at 1171.

¹⁶¹ *Id.* at 1170-71.

¹⁶² *See generally* Series AGI W. Linn of Appian Grp. Inv'rs DE, LLC v. Eves, 158 Cal. Rptr. 3d 193, 199-200 (Cal. Ct. App. 2013) (discussing freedom of contract principles under California law).

¹⁶³ *Id.*

However, surrogacy arrangements contravene matters of positive law and public policy.

It is a well-established matter of constitutional law that freedom of contract is a qualified rather than absolute right.¹⁶⁴ For example, freedom of contract can be restricted with respect to public interest.¹⁶⁵ However, the public's interest in preventing peonage and transactions of human beings under the Thirteenth Amendment is of the highest importance.¹⁶⁶ We fought our nation's deadliest war in history up to that point to abolish it. Further, prostitution, narcotics, gambling, and a host of other contractual arrangements are outlawed because the government has a significant interest in banning them that outweighs freedom of contract.¹⁶⁷ Therefore, although freedom of contract is a bedrock principal of California contract law, it must be outweighed by the public interest in precluding commodification of human beings.

C. Section 7962 of the California Family Code Violates the Substantive Due Process Rights of Newborns

The sanctity of the parent-child relationship is protected by the substantive due process guarantee of the Fourteenth Amendment.¹⁶⁸ By awarding custody in surrogacy disputes to the intended parents without consideration of the child's best interests, California is potentially depriving children of a relationship with one's proper parent. Therefore, by using an intent test California is also violating a child's due process right to a relationship with their parent.

The Supreme Court has stated that the right to maintain a parent-child relationship is a natural right guaranteed by the virtue of human dignity and rising above what can be guaranteed by the government.¹⁶⁹ The Tenth Circuit has stated that a child "has a constitutionally protected interest in a relationship with her parent."¹⁷⁰ And the Ninth Circuit has found that children have a liberty interest in maintaining

¹⁶⁴ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937).

¹⁶⁵ *Id.* at 392-93.

¹⁶⁶ U.S. CONST. amend. XIII.

¹⁶⁷ See, e.g., CAL. HEALTH & SAFETY CODE § 11350 (2018) (criminalizing narcotics); CAL. PENAL CODE § 647(b) (2018) (outlawing prostitution); CAL. PENAL CODE § 330 (2018) (outlawing gambling).

¹⁶⁸ See *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

¹⁶⁹ See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977).

¹⁷⁰ *Lowery v. City of Riley*, 522 F.3d 1086, 1092 (10th Cir. 2008).

their relationship with a parent.¹⁷¹ In *Smith v. Fontana*,¹⁷² the Ninth Circuit explained that the distinction between the parent-child and child-parent relationship does not “justify constitutional protection for one but not the other.”¹⁷³ The codification of a child’s liberty right to a relationship with her parent originated in the Ku Klux Klan Act of 1871, which provided a remedy for family members of those affected by the Klan.¹⁷⁴ There, the legislative history evinces the right of a man’s children to receive a remedy for loss of support and companionship their parent provided.¹⁷⁵

Section 7962 of the California Family Code violates this liberty right when it determines the custody of babies born to surrogates without considering their connection by gestation and genetics, or more importantly their best interests.¹⁷⁶ By failing to constitutionally evaluate the best interests of children in surrogacy custodial disputes, California is at least sometimes awarding custody improperly. When California awards custody contrary to the best interests of the child it deprives the child of a relationship with her proper parent. Therefore, by using a best interests test California jeopardizes a right guaranteed by human dignity itself.

III. SOLUTION

Since section 7962 of the California Family Code is unconstitutional the state must repeal the statute and replace it with an alternative law governing surrogacy arrangements. To do so California must consider each of the different approaches other states have taken to regulate surrogacies: the intent test;¹⁷⁷ genetics test;¹⁷⁸ gestation test;¹⁷⁹ and best interests test.¹⁸⁰ I propose California cherry-pick elements from each of these solutions, assigning them points to provide an objective, bright-line solution to surrogacy disputes, while also accounting for

¹⁷¹ *Smith v. Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987).

¹⁷² *Smith*, 818 F.2d at 1411.

¹⁷³ *Id.*

¹⁷⁴ Ku Klux Klan Act of 1871, ch. 22, sec. 2, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1985 (2018)).

¹⁷⁵ CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871).

¹⁷⁶ See CAL. FAM. CODE § 7962(f)(2) (2018) (pursuant to a valid assisted reproduction agreement, a court order will terminate the parental rights of the surrogate and establish a parent-child relationship with the intended parents).

¹⁷⁷ See *supra* Section I.D.

¹⁷⁸ See *supra* Section I.C.

¹⁷⁹ See *supra* Section I.B.

¹⁸⁰ See *supra* Section I.A.

the best interests of the child by adopting what I have coined a “two-part hybrid best interests test.”

The first part of the test is purely objective and offers a bright line component. Points are assigned to each adverse party in a custody dispute rising out of a surrogacy arrangement if certain tests are met. This part of the test incorporates the genetics, gestation, and intent tests. The second part of the test is more subjective and is concerned with the best interests of the newborn, assigning points on a one to three scale based on a judicial determination of three factors often considered in state best interests’ tests.

A. Part I: Objective Three Part Checklist

Part I of the two-part hybrid best interests test considers intent, genetics, and gestation.

Because genetics, gestation, and intent tests each have virtues but are unconstitutional, I propose that California incorporate all three into one test to determine custodial disputes arising from surrogacy arrangements. To account for the importance of a genetic connection each genetic parent receives one point. One point is awarded to the surrogate for the gestational connection. Intent is rewarded with one point per intended parent.

Part I of the two-part hybrid best interests test accounts for the unique genetic and gestational connections between parent and child. It also provides for the unique role that the intended parents play in bringing babies born to surrogates into fruition. Further, it offers an objective, bright-line rule that allows for predictability when entering into a surrogacy arrangement and takes away some discretion from the judiciary where a particular judge may be biased one way or the other concerning this important issue.

In a standard traditional surrogacy arrangement, Part I would offer one point to the surrogate for gestation, one point to the intended parent who donated half the genetic material, and one point to each of the intended parents. The other point would depend on whether the other half of the genetic material came from either a third-party donor or the surrogate. Therefore, in a standard traditional surrogacy arrangement, Part I of my proposed test would leave the intended parents with three points, while the surrogate would have one or two depending on whether she donated her egg. In a standard gestational surrogacy arrangement, the score would be similar but the intended parents would have one additional point for providing all the genetic material. The surrogate would generally have one fewer point leaving the score at four to one.

B. Part II: Best Interests Test

To satisfy the Equal Protection Clause, any law governing surrogacy arrangements under California law must take into account the best interests of newborns.¹⁸¹ Best interests tests treat children born to surrogates the same as those born in traditional pregnancies.¹⁸² Best interests tests also account for the state's compelling interest in protecting newborns.¹⁸³ In addition to treating the children the same, they treat the intended parents the same as parents that conceive babies traditionally by resolving custody disputes in the same manner.¹⁸⁴ The biggest drawbacks to best interests tests are 1) equal protection concerns arising from homosexual and infertile couples unable to traditionally conceive;¹⁸⁵ 2) traditional contractual principles promoting freedom of contract;¹⁸⁶ 3) the substantive due process right of privacy in reproductive decisions;¹⁸⁷ and 4) the indeterminacy and uncertainty best interest tests bring to surrogacy arrangements.¹⁸⁸ While the constitutional and contractual concerns are valid and important, they must be outweighed by the more compelling state interest in protecting the best interests of children.¹⁸⁹ Moreover, most surrogacy disputes resolved using the best interests test are resolved in favor of the intended parents. A recent study found that seventy-six percent of cases decided under the best interests test would have had the same result under an intent test.¹⁹⁰ Therefore, courts have found that prior intent is usually indicative of the best interests of newborns.¹⁹¹ However, best interests tests allow for intervention when

¹⁸¹ See *supra* Sections II.A.1–4.

¹⁸² See *supra* Section II.A.2.

¹⁸³ See *supra* Section I.A.

¹⁸⁴ See *supra* Section II.A.2.

¹⁸⁵ See *supra* Section II.A.5.

¹⁸⁶ See *supra* Section II.B.3 and note 54.

¹⁸⁷ See *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1279 n.10 (D. Utah 2002) (suggesting that state burdens on procreation methods must meet same scrutiny as state burden on abortion because both infringe on fundamental right to privacy in procreative choices). See generally *Roe v. Wade*, 410 U.S. 113 (1973) (state ban on abortion violated right to make own reproductive decisions); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state ban on contraceptives violated marital right to privacy).

¹⁸⁸ See, e.g., Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 255 (1975).

¹⁸⁹ See *supra* Sections II.A.5, II.B.3.

¹⁹⁰ Mary P. Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test to Determine Parentage in Assisted Reproductive Technology Cases*, 50 HOUS. L. REV. 1295, 1306 (2013).

¹⁹¹ See *id.*

the intended parent(s) are not in the best interest of the child and provide them the same process as other children.

The indeterminacy and uncertainty of best interests tests do provide a troubling roadblock for intended parents. That is why I propose that California adopt guiding principles for the judiciary to consider when analyzing the best interests of newborns. In his dissent in *Johnson v. Calvert*, Justice Kennard advocated three factors to consider when evaluating the best interests of children.¹⁹² The factors are: 1) the ability to nurture physical and mental development of the child; 2) the ability to provide moral and intellectual guidance; and 3) the capacity to provide a safe and stable environment.¹⁹³ I propose assigning each of these factors one to three points based on a judicial determination of each element. This system mitigates some of the indeterminacy of the best interests test while still situating the children of surrogates similarly to children born traditionally.

C. Hypothetical Applications of the Test and the Intent-Tiebreaker

Applying my proposal to the facts of *Cook v. Harding*¹⁹⁴ displays its efficacy. In Part I of the test, Melissa Cook would receive one point for gestation of the baby.¹⁹⁵ C.M. would receive a point for being the intended parent and another point for providing genetic material.¹⁹⁶ C.M. would lead two to one going into Part II, which is consistent with the goal of my proposed test to reward intent. However, he would score low in Part II due to his lack of financial resources, physical disability, and living situation.¹⁹⁷ For example, considering his attempt to abort at least one of the triplets, his capacity to provide a safe stable environment would be low, likely a one or a two in that category. His ability to oversee the triplet's mental and physical development would also be hampered by the fact that he admitted he did not think he could take care of triplets, giving him a one or two in that category. His ability to provide effective moral and intellectual guidance is not as clear from the facts of the case. However, Melissa Cook had raised four children of her own without any judicial determination against her. Therefore, applying the two-part hybrid best interests test to these facts, there likely would be a judicial

¹⁹² *Johnson v. Calvert*, 851 P.2d 776, 800 (Cal. 1993) (Kennard, J., dissenting).

¹⁹³ *Id.*

¹⁹⁴ 190 F. Supp. 3d 921, 924 (C.D. Cal. 2016).

¹⁹⁵ *See supra* Section III.A.

¹⁹⁶ *See supra* Section III.A.

¹⁹⁷ *See supra* Section III.B.

determination granting custody of the newborns to Melissa Cook in the best interests of the newborns.

A similar result would likely occur in a hypothetical dispute between a surrogate and the Australian couple that refused to take custody of the disabled child they contracted for.¹⁹⁸ And likewise for a man who sought to produce six babies and only take custody of two.¹⁹⁹ However, in most cases decided under this formula, the intended parents would receive custody based on the point advantage they receive in Part I. Only when awarding custody to the intended parents is determined to be notably contrary to the best interests of the child would custody be awarded to the surrogate.

To further address the concerns of advocates of the intent test, who worry about the effect of a best interests test on intended homosexual and infertile parents, I propose that in the event of a tie, custody be awarded to the intended parents. This is consistent with the California Court of Appeals holding in *Buzzanca*²⁰⁰ that found a tie should be broken in favor of the intended parents.²⁰¹ Further, the tiebreaker rewards contractual principles and satisfies the equal protection concerns of homosexual and infertile couples. Finally, finding for the intended parents in the event of a tie is fundamentally fair because without the intended parents there would be no baby to cause the dispute in the first place.

Any test that strays from a determination of pure intent will be unsatisfactory to some surrogacy advocates. However, pure intent tests are manifestly unconstitutional and must be repealed and replaced. The two-part best interests test seeks to address those concerns by rewarding intent while also incorporating the important genetic and gestational aspects. Most importantly, it evaluates the best interests of the child, which is necessary under the Equal Protection Clause.

CONCLUSION

The California legislature had good motives when enacting section 7962 of the California Family Code. Acting to protect the rights of homosexual and other infertile couples to have babies with whom they share a genetic connection without any unpredictability is a noble cause. However, as the examples I have provided demonstrate, there is a serious and real risk of damage to children from intent tests.

¹⁹⁸ Field, *supra* note 156, at 1170-71.

¹⁹⁹ *Id.* at 1170.

²⁰⁰ 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

²⁰¹ *Id.* at 288.

Any replacement for section 7962 must address the best interests of the children. A determination of such interests is necessary in order to satisfy equal protection guarantees, liberty rights to relationships with parents, and Thirteenth Amendment guarantees against commodification. Moving forward, it will be interesting to see whether a constitutional challenge to section 7962 or another state's intent statute succeeds in federal court, before surrogacy becomes front-page news for the wrong reasons.